Proskauer

SEC Proposes Reforms for Business Development Companies and Registered Closed-End Funds

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On March 20, 2019, the Securities and Exchange Commission (the "SEC") proposed a series of rule and form amendments (the "Proposed Offering Rules") that would modify the registration, communications and offering processes under the Securities Act of 1933, as amended (the "Securities Act"), for business development companies ("BDCs") and closed-end investment companies ("CEFs" and, together with BDCs, "Affected Funds") registered under the Investment Company Act of 1940, as amended (the "1940 Act").[1] The Proposed Offering Rules would, among other things:

- generally streamline the registration process for Affected Funds;
- permit Affected Funds to qualify as well-known seasoned issuers (as defined in Rule 405 under the Securities Act, "WKSIs");
- expressly permit additional communications by and about Affected Funds during a registered public offering, such as certain factual business information, forward-looking information, free writing prospectuses and broker-dealer research reports; and
- permit Affected Funds to satisfy their final prospectus delivery requirements by filing the prospectus with the SEC.

The Proposed Offering Rules are intended to allow Affected Funds to take advantage of the securities offering framework that has been available to operating companies since 2005,[2] thereby reducing the disparities between the treatment of Affected Funds and operating companies in the registered securities offering process.

In addition (and perhaps as a surprise to many in the industry), the SEC proposed a series of rule and form amendments that are intended to modify the broader disclosure and regulatory framework for Affected Funds in light of the proposed securities offering framework that would be applicable to them (together with the Proposed Offering Rules, the "Proposed Rules").[3] The Proposed Rules would impose on Affected Funds certain incremental and tailored reporting obligations, including, for CEFs, a requirement to file Form 8-Ks and, for all Affected Funds, additional annual reporting requirements and "structured data requirements" (i.e., tagging of specified items in Inline XBRL and filing Interactive Data Files). In addition, CEFs that operate pursuant to Rule 23c-3 under the 1940 Act ("Interval Funds") would be permitted to pay securities registration fees using the same method currently used by mutual funds and exchange-traded funds ("ETFs").

The Proposed Rules will be subject to a 60-day public comment period following their publication in the Federal Register.

Background

In 2005, investment companies, including Affected Funds, were deemed to be "ineligible issuers" and were explicitly excluded from the Securities Offering Reform. This created meaningful disparities in the offering rules applicable to operating companies and those applicable to BDCs and CEFs, resulting in Affected Funds facing various regulatory impediments to capital raising not experienced by operating companies. For example, since 2005, barring unique circumstances, most operating companies with greater than $75 million of market value of outstanding common equity held by non-affiliates (i.e., "public float") have been able to file a shelf registration statement and be subject to review by the staff of the SEC (the "Staff") of such registration statement only once every three years. By contrast, due to the inability to incorporate by reference, BDCs and CEFs have been required to file post-effective amendments to their shelf registration statements and to have those post-effective amendments declared effective by the Staff in order to comply with Section 10(a)(3) of the Securities Act. These and other regulatory impediments have made it more difficult for Affected Funds to strategically access the capital markets during favorable market conditions and benefit from the lower costs of capital and offering costs enjoyed by operating companies.

The Proposed Offering Rules are a result of the SBCAA and the Growth Act, which generally directed the SEC to eliminate those 2005 exclusions with respect to BDCs and certain CEFs and to permit them, in varying ways, to utilize the Securities Offering Reform rules that have been available to operating companies for over a decade. The SBCAA requires the SEC to revise applicable rules and forms to permit BDCs to use Securities Offering Reform rules. The SBCAA expressly and specifically identifies required revisions to the relevant rules and forms and provides that, in the absence of final rules becoming effective, the revisions became self-implementing on March 24, 2019. Similarly, the Growth Act directs the SEC to adopt rules to allow CEFs with securities listed on a national securities exchange ("Listed CEFs") and Interval Funds to use Securities Offering Reform rules, subject to appropriate conditions. Unlike the SBCAA, however, the Growth Act does not expressly or specifically identify required revisions to the applicable rules and forms, nor are all of its provisions self-implementing.[4]

The SEC's overall approach in the Proposing Release is one of general parity concerning the availability and application of the Securities Offering Reform to Affected Funds despite greater discretionary authority being provided to the SEC under the Growth Act with respect to CEFs than under the SBCAA with respect to BDCs. In addition, the SEC expanded the scope of CEFs covered by the Proposed Rules to provide for parity between BDCs and CEFs, in that both listed and unlisted BDCs were covered by the SBCAA, whereas unlisted CEFs that did not operate as Interval Funds (e.g., "tender offer" funds and non-continuously offered unlisted CEFs) were not covered by the Growth Act.[5] Notably, however, the Proposed Rules would impact categories of Affected Funds differently. As a result, CEFs should carefully review the Proposed Rules as certain proposals, including the requirements to provide management's discussion of fund performance and changes to Rule 8b-16 under the 1940 Act would apply to all CEFs and not just Listed CEFs or CEFs that engage in continuous offerings that may seek to qualify as Seasoned Funds (as defined below). For ease of reference, a simplified version of the chart provided by the SEC detailing the impact of the Proposed Rules on various types of Affected Funds is provided in Appendix A.

The timing and scope of the Proposed Rules are interesting, in that, under the SBCAA, the SEC had until March 23, 2019 (i.e., three days after the issuance of the Proposed Rules) to adopt rules implementing the required offering reforms before the changes became self-implementing pending final rules becoming effective.[6] As a result, notwithstanding the issuance of the Proposed Rules, the offering reform provisions expressly set forth in the SBCAA are currently applicable to BDCs and will continue to be applicable until such time as final rules become effective. That is not the case for CEFs, including Listed CEFs and Interval Funds, as the SEC has until May 24, 2020 to complete the rulemaking required by the Growth Act. This disparity creates a number of unique issues for BDCs, many of which will continue through the effectiveness of final rules.[7]

Summary of Proposed Offering Reforms

Incorporation by Reference

As of today, under the SBCAA, BDCs (but not CEFs) are permitted to incorporate by reference into their shelf registration statements certain past and future reports filed under the Securities Exchange Act of 1934, as amended (the "*Exchange Act*"). The Proposed Offering Rules would expand this provision of the SBCAA and permit qualifying Affected Funds to file short-form registration statements on Form N-2 that are the functional equivalent of a registration statement on Form S-3 filed by an operating company. Unlike the separate long-form and short-form registration statements (Forms S-1 and S-3, respectively) used by operating companies, there would not be a separate registration form to effect the short-form registration by Affected Funds; rather, qualifying Affected Funds would continue to file on Form N-2. In addition, Affected Funds would be required to make their prospectus or statement of additional information ("SAI") and materials incorporated by reference available on a website, rather than delivering such information to investors as required today.

Under the Proposed Offering Rules, an Affected Fund would be able to file the short-form registration statement on Form N-2 that incorporates by reference certain required information if:

- it meets the registrant requirements of General Instruction I.A. of Form S-3, which generally requires, among other items, the registrant to have (1) a class of securities registered pursuant to Section 12(b) of the Exchange Act, a class of equity securities registered under Section 12(g) of the Exchange Act or a

requirement to file reports pursuant to Section 15(d) of the Exchange Act, (2) been subject to the requirements of Section 12 or 15(d) of the Exchange Act and filed all material required to be filed under Section 13, 14 or 15(d) for at least the 12 calendar months immediately preceding the filing of the registration statement and (3) timely filed certain reports required under Section 13, 14 or 15(d) of the Exchange Act[8] during the 12 calendar months and any portion of a month immediately preceding the filing of the registration statement, and it meets the transaction requirements of General Instruction I.B or I.C of Form S-3, which generally requires that the registrant have greater than $75 million of public float (Affected Funds that meet such registrant and transaction requirements, "Seasoned Funds"); and

- in the case of a CEF, it must also have been registered under the 1940 Act for at least 12 calendar months immediately preceding the filing of the registration statement and have timely filed all reports required to be filed under Section 30 of the 1940 Act, such as Forms N-CEN and N-PORT, during the 12 calendar months and any portion of a month immediately preceding the filing of the registration statement.

Importantly, substantially all existing Interval Funds and all other unlisted CEFs, along with unlisted BDCs, generally would not be able to file short-form registration statements on Form N-2 because their common equity is not listed on a national securities exchange and therefore such funds do not have a public float.[9] Interval Funds, which engage in continuous securities offerings, generally would not be able to avail themselves of a short-form registration statement that omits information required to be in its prospectus in any event. Interval Funds will still remain eligible to file certain post-effective amendments to their registration statements on Form N-2 that are immediately effective under Rule 486(b) under the Securities Act. In the Proposing Release, the SEC noted that it is assessing the no-action relief issued, on a case-by-case basis, to Listed CEFs that have effective shelf registration statements that are updated automatically through post-effective amendments filed under Rule 486(b), as such letters may be withdrawn in connection with the adoption of final rules.[10]

As a result of the proposed modification of the undertakings to Form N-2 to remove the current prohibitions on incorporation by reference, Seasoned Funds would be able to:

- "backward" incorporate by reference into the prospectus and any SAI (1) the latest annual report filed under Section 13(a) or 15(d) of the Exchange Act that contains financial statements for the Seasoned Fund's latest fiscal year for which a Form 10-

K or Form N-CSR was required to be filed, (2) all other reports filed under Section 13(a) or 15(d) of the Exchange Act since the end of the fiscal year covered by such annual report and (3), if the prospectus or SAI relates to the registration of capital stock and securities of the same class are registered under Section 12 of the Exchange Act, the description of such class of capital stock included in a registration statement filed under the Exchange Act, including any amendment or reports filed for the purpose of updating such description; and

- "forward" incorporate by reference into the prospectus and any SAI all documents subsequently filed by the Seasoned Fund under Sections 13(a), 13(c), 14 or 15(d) of the Exchange Act and prior to termination of the offering.

A Seasoned Fund will be allowed to satisfy disclosure requirements either directly in the prospectus or through incorporation by reference. Under the Proposed Rules, CEFs will not be required to incorporate by reference Forms N-PORT and N-CEN as such information is not specifically required to be disclosed under Form N-2. In addition, Seasoned Funds that elect to include incremental disclosures in periodic reports in order to satisfy certain requirements under Form N-2 will be required to identify in those periodic reports the information included for this purpose.

Well-Known Seasoned Issuer Status

As of today, under the SBCAA, BDCs (but not CEFs) can qualify as a WKSI. The Proposed Offering Rules, however, would allow all Affected Funds to qualify as WKSIs. The primary advantages of WKSI status include the ability to (1) file registration statements (and amendments) that become effective automatically, (2) register an unspecified amount of securities, (3) add additional classes of securities to such registration statements, (4) defer payment of SEC filing fees until the time of takedowns from a shelf registration statement and (5) communicate to the public more freely than a non-WKSI without violating the "gun-jumping" provisions of Section 5 of the Securities Act.

In order to qualify as a WKSI, an Affected Fund generally must:

- be a Seasoned Fund;
- not be an "ineligible issuer";[11] and
- as of a date within 60 days of the latest of (1) the filing of its most recent shelf registration statement, (2) the most recent amendment to a shelf registration statement for purposes of complying with Section 10(a)(3) of the Securities Act (i.e., to add audited financial statements) or (3), if the events described in clauses

(1) and (2) have not occurred within the previous 16 months, the filing of the Affected Fund's most recent annual report, have at least $700 million in public float or have issued for cash, within the prior three years, at least $1 billion in aggregate principal amount of non-convertible securities (other than common equity) through primary offerings registered under the Securities Act.

Omission of Information from a Base Prospectus or Prospectus Supplement

As of today, under the SBCAA, BDCs (but not CEFs) are generally eligible to use Rules 424 and 430B(a) under the Securities Act to file prospectus supplements and to omit certain information from prospectuses to be used in shelf takedowns (in addition to the information historically omitted in reliance on Rule 430C under the Securities Act), respectively. The Proposed Offering Rules would enable all Seasoned Funds to rely on Rules 424 and 430B and would supplant Rule 497 with Rule 424 as the exclusive rule pursuant to which all Seasoned Funds would file prospectus supplements.[12]

Under Rule 430B(a), Seasoned Funds that qualify as WKSIs would be able to omit the plan of distribution from the registration statement as well as information on whether the offering is a primary offering or a secondary offering on behalf of selling securityholders. In addition, under Rule 430B(b), all Seasoned Funds would be able to omit information on selling securityholders and the amount of securities registered on their behalf, subject to certain conditions. In each case, these provisions are consistent with the flexibility afforded to operating companies.

Under the Proposed Offering Rules, for purposes of determining liability under the Securities Act to any purchaser of securities, each prospectus supplement filed under Rule 424(b)(2), (b)(5) or (b)(7) as part of a registration statement in reliance on Rule 430B relating to a shelf takedown or offering by an applicable Affected Fund would be deemed part of and included in the registration statement containing the corresponding base prospectus as of the earlier of (1) the first use after effectiveness and (2) the date of the first contract of sale of securities in the offering described in the prospectus.[13] Each prospectus filed pursuant to Rule 424(b)(3) would be deemed to be part of the registration statement as of the date the filed prospectus was deemed part of and included in the registration statement.

Communications Rules Under the Securities Act

As of today, under the SBCAA, BDCs (but not CEFs) are permitted incremental flexibility with respect to the general restrictions on certain communications in connection with proposed registered offerings of securities. Of particular note, BDCs are expressly permitted to use free writing prospectuses in reliance on Rules 164 and 433 under the Securities Act. As a general matter, free writing prospectuses may be used more broadly in a wider number of scenarios than traditional investment company advertisements filed under Rule 482 under the Securities Act, including, most notably, before the filing of a registration statement, which is not permitted for investment company communications subject to Rule 482.

In addition, as of today, BDCs are permitted to:

- publish factual information about the BDC or proposed offerings, including "tombstone ads," in reliance on Rule 134. These communications are deemed not to be prospectuses;
- communicate without risk of violating of the "gun-jumping" provisions of Section 5 for a period ending 30 days prior to the filing of a registration statement in reliance on Rule 163A (provided that the communication does not reference the securities offering that is subject to such registration statement, the BDC takes reasonable steps to prevent further distribution of the communication within the 30-day period prior to the filing of the registration statement and certain other conditions are met);
- publish or disseminate regularly released factual business information and forward-looking information at any time, including around the time of a registered offering, in reliance on Rule 168. These communications are deemed not to be prospectuses or pre-filing "offers" for purposes of Section 5(c);
- continue publication or dissemination of regularly released factual business information that is intended for use by persons other than in their capacity as investors or potential investors in reliance on Rule 169. Rule 169 communications are deemed not to be prospectuses; and
- if qualified as a WKSI, engage at any time in oral and written communications, including free writing prospectuses, subject to the same conditions applicable to other WKSIs, including Rule 163.

Under the Proposed Offering Rules, this increased flexibility would be extended to all Affected Funds. Affected Funds would be permitted to take advantage of this flexibility or to continue to rely on Rule 482 and other rules currently applicable to their communications.

Broker-Dealer Research Reports

As of today, under the SBCAA, broker-dealers participating in a registered offering of a BDC's securities are permitted to publish or distribute research reports about that BDC's securities that are not involved in the offering (and are not convertible into or similar to securities involved in the offering), in reliance on the non-exclusive safe harbor provided by Rule 138 under the Securities Act; provided that the broker-dealer publishes or distributes such research reports in the regular course of its business and the BDC has filed all periodic reports on Form 10-K or Form 10-Q required pursuant to Section 13 of the Exchange Act during the preceding 12 months (or such shorter time that the BDC was required to file such reports). Under the Proposed Offering Rules, this relief would be extended to the publication of research by participants in offerings by CEFs, provided that, in lieu of periodic reports on Form 10-K and Form 10-Q, the CEF has filed all periodic reports on Form N-CSR, Form N-Q, Form N-PORT or Form N-CEN required pursuant to Section 30 of the 1940 Act during the preceding 12 months (or such shorter time that the CEF was required to file such reports).

As of today, under the SBCAA, broker-dealers participating in a registered offering of a BDC's securities may publish or distribute certain issuer-specific research reports in reliance on the non-exclusive safe harbor provided by Rule 139 under the Securities Act. Notwithstanding the statutory mandate under the SBCAA, the SEC did not propose to amend Rule 139 to apply to BDCs. In addition, the SEC did not propose to extend such safe harbor provisions to CEFs. Rather, the SEC has determined that the recently adopted Rule 139b, which extends Rule 139 to cover certain covered investment fund research reports, satisfies the directives of the SBCAA and the Growth Act. However, Rule 139b imposes certain incremental exclusions from the safe harbor (such as research reports by a broker-dealer that is affiliated with the investment adviser to an Affected Fund) not currently contemplated by Rule 139 (which is applicable to BDCs through at least the effectiveness of final rules).

Prospectus Delivery Rules

As of today, under the SBCAA, BDCs (but not CEFs) are permitted to use Rules 172 and 173 under the Securities Act, which generally allow for the satisfaction of final prospectus delivery obligations through filing such final prospectus with the SEC. Under the Proposed Offering Rules, all Affected Funds would be permitted to use Rules 172 and 173.

Other Proposed Rules

In addition to the Proposed Offering Rules, the SEC proposed a series of amendments to other rules and forms that are intended to tailor the disclosure and regulatory framework for Affected Funds in light of the anticipated changes to the offering rules under the Securities Act discussed above. Many of the proposed amendments are not expressly required by the SBCAA or the Growth Act.

As discussed in detail below, these proposed amendments include:

- new annual and current reporting requirements, including required reporting by certain CEFs on Form 8-K;
- amendments to provide all Affected Funds additional flexibility to incorporate information by reference;
- structured data requirements; and
- proposed enhancements to the disclosures that CEFs make to investors when the funds are not updating their registration statements.

New Form 8-K Filing Requirements

Under the Proposed Rules, CEFs that are reporting companies under Section 13(a) or 15(d) of the Exchange Act would be required to file current reports on Form 8-K to publicly disclose certain events and information in a manner similar to current reporting requirements imposed on BDCs and operating companies. The SEC notes that certain CEFs, including a majority of Listed CEFs and Interval Funds, already make public such information, whether through voluntary Form 8-K filings, press releases, prospectus supplements or other Regulation FD compliance methods. The SEC also noted that although many CEFs may provide disclosures that are similar to those required by Form 8-K, the timeliness of such disclosures may vary.[14]

In addition, the Proposed Rules would amend Form 8-K as it relates to Affected Funds to add two new reportable events (to be numbered Items 10.01 and 10.02, respectively):

- any material change in investment objectives or policies that has not been, and will not be, submitted to stockholders for approval unless disclosed in a post-effective amendment to a registration statement or prospectus filed under Rule 424. The required disclosures would include the date on which the material change is to be implemented and a description of the change; and
- any material write-down in the fair value of a significant investment. This requirement is intended to provide parity with existing requirements for operating companies to disclose material impairments to certain assets.[15]

In the Proposing Release, the SEC asserts that these events are important to investors and that disclosure should be required on a timely basis when they occur.

For Affected Funds eligible to file short-form registration statements, these Form 8-K requirements would take effect upon the earlier of (1) one year after publication of a final rule in the Federal Register and (2) the date of filing a short-form registration statement under Form N-2. For all other Affected Funds, these Form 8-K requirements would take effect 18 months after publication of a final rule in the Federal Register.

Other Disclosure Changes

Under the Proposed Rules, Seasoned Funds that file short-form registration statements would be required to include the following information in their annual reports:

- the fee and expense table currently required by Item 3 of Form N-2;
- share price data currently required by Item 8.5 of Form N-2; and
- the senior securities table currently required by Item 4.3 of Form N-2.

The SEC notes that, because the annual report will be forward incorporated by reference by Seasoned Funds, there should be no incremental or duplicative disclosure requirements imposed by these disclosure requirements.

The Proposed Rules also set forth four new disclosure requirements:

- BDCs would be required to disclose financial highlights currently required by Item 4.1 of Form N-2 for CEFs in their registration statements and annual reports;
- CEFs would be required to provide management's discussion of fund performance in their annual reports, similar to the disclosures provided by mutual funds and ETFs in their annual reports and comparable to the management's discussion and analysis disclosures provided by operating companies and BDCs. This disclosure

requirement would not apply until the first annual report filed by a CEF after the one-year anniversary of publication of a final rule in the Federal Register;

- CEFs that forgo an annual update to their registration statements, and provide updating disclosures in their annual reports in accordance with Rule 8b-16 under the 1940 Act, must disclose not only certain key changes (as currently required), but also the relevant term/objective/policy both before and after the change; and
- Seasoned Funds filing short-form registration statements would be required to disclose in their registration statements or annual reports unresolved comments received from the Staff on their periodic or current reports filed under the Exchange Act or the 1940 Act, as applicable, or their registration statements if the applicable Seasoned Fund believes such comments are material, were issued more than 180 days before the end of the fiscal year covered by the annual report and remained unresolved as of the filing of the annual report.

The Proposed Rules make a number of additional revisions, generally of a technical nature, to disclosure requirements applicable to CEFs to acknowledge the fact that certain filing requirements, as well as the statutory basis for such requirements, differ from those applicable to operating companies and BDCs.

Structured Data Requirements

The Proposed Rules would impose certain structured data reporting requirements on Affected Funds. Specifically:

- BDCs would be required to submit financial statement information in registration statements and Exchange Act reports using Inline XBRL format;
- Affected Funds would be required to tag certain data on the cover page of Form N-2 using Inline XBRL format;
- Affected Funds would be required to tag certain disclosures included in their prospectuses, including the fee table, senior securities table and risk factors, using Inline XBRL format; and
- Seasoned Funds would be required to tag certain information in their Exchange Act reports using Inline XBRL format to the extent such information is required to be tagged in the prospectus.

Affected Funds would be required to submit Interactive Data Files presenting information in XBRL format with (1) any registration statements or post-effective amendments, (2) any prospectus filed pursuant to Rule 424 and (3), in the case of Seasoned Funds, any Exchange Act report incorporated by reference into any of the foregoing. These requirements would be consistent with the requirements currently imposed on operating companies, mutual funds and ETFs.

Affected Funds eligible to file a short-form registration statement would be required to comply with the structured data requirements no later than 18 months after the date of publication of a final rule in the Federal Register. All other Affected Funds would be required to comply with the structured data requirements no later than 24 months after publication of a final rule in the Federal Register.

Rule 418(a)

As of today, under the SBCAA, BDCs (but not CEFs) are exempt from Rule 418(a)(3) under the Securities Act, which generally requires registrants to provide the Staff certain reports or memoranda related to the business or operations of a registrant upon request. Under the Proposed Rules, all Affected Funds would be exempt from Rule 418(a)(3).

Proxy Statement Disclosures

As of today, under the SBCAA, BDCs (but not CEFs) that qualify for the filing of short-form registration statements may incorporate by reference into their proxy statements filed under Schedule 14A certain information[16] that is required to be disclosed in connection with proposals covered by Item 11 (authorization or issuance of any securities otherwise than for exchange) or Item 12 (the modification of any class of securities or the issuance or authorization for issuance of securities of the registrant in exchange for outstanding securities) of such Schedule 14A. Under the Proposed Rules, all Affected Funds that meet the appropriate criteria would be eligible for such incorporation by reference.

Registration Fees for Interval Funds

Under the Proposed Rules, Interval Funds would be able to pay their registration fees to the SEC on an annual net basis, similar to the manner in which mutual funds and ETFs pay their registration fees, effective one year after publication of a final rule in the Federal Register. Additionally, Interval Funds would be required to submit associated filings on Form 24F-2 in XML format as of such date.

Regulation FD

As of today, under the SBCAA, for purposes of determining eligibility to use a shelf registration statement, BDCs (but not CEFs) are not considered to have failed to file required materials under the Exchange Act, or to have filed those materials in a timely manner, if the disclosure was required solely by Rule 100 of Regulation FD. Under the Proposed Rules, all Affected Funds would benefit from this same revision.

Analysis and Considerations

General

The Proposed Rules were highly anticipated by many industry participants, in large part because of the ability to forward and backward incorporate by reference. Barring unique circumstances, such ability generally will permit Seasoned Funds to file a shelf registration statement and be subject to Staff review of such registration statement only once every three years. By virtue of annual reports being incorporated by reference (and therefore a new effectiveness date of the shelf registration statement for purposes of Section 10(a)(3) of the Securities Act), this will avoid the annual updates to shelf registration statements and the impact that the annual Staff review of such updates had on the ability to complete registered offerings during certain portions of the year, thereby providing greater ability to access the public capital markets when conditions are appropriate. Of course, the SEC is likely to increase the frequency of its review of annual reports and other periodic filings by Seasoned Funds to compensate for the less frequent review of registration statements.

Seasoned Funds, including BDCs that rely on the self-implementing provisions of the SBCAA pending the effectiveness of final rules, should consider the extent to which their disclosures, particularly those made in anticipation of final incorporation by reference rules, should comply with the incremental disclosure requirements set forth in the Proposed Rules. For example, Seasoned Funds with a March 31 fiscal year-end will file their annual reports before final rules become effective (and those with June 30 fiscal year-ends may well also file before final rules are issued). Such Seasoned Funds could disclose in their annual reports, with appropriate identifying language, the information that would be required in an annual report incorporated by reference into a shelf registration statement under the Proposed Rules if adopted in their current form. Such disclosure would include the fee and expense table, share price data and senior securities table currently required by Items 3, 8.5 and 4.3, respectively, of Form N-2 and, for BDCs, the financial highlights currently required by Item 4.1 of Form N-2 for CEFs.

As Affected Funds evaluate the potential impacts of the Proposed Rules, they will need to consider the potential prospective impact of the proposed Form 8-K requirement to report material write-downs in the fair value of significant investments, which events are less predictable and potentially more frequent than changes in investment objectives and policies for which current reporting also would be required. For example, Affected Funds that have concentrated portfolio holdings, especially in securities that do not have market prices and are generally priced by a pricing service or independent valuation firm pursuant to procedures approved by the Affected Funds' board of directors, or Affected Funds that primarily value their investments using the practical expedient (the common valuation practice for registered funds of funds), may record material changes in the fair value of a "significant" investment based on the valuations received from a third party (i.e., the pricing service or underlying fund) that may not reflect an actual impairment in the investment (or the associated issuer or guarantor). In addition, Affected Funds will need to consider whether such proposed disclosure requirements should be followed during the pendency of final rules becoming effective.

Unique Considerations for BDCs

As noted above, certain provisions of the SBCAA have become self-implementing with respect to BDCs. In the continued absence of transition guidance and through the effectiveness of final rules, BDCs and their investment advisers in consultation with outside advisers and the Staff will need to give careful consideration as to the appropriate mechanism of implementing the relevant offering reforms mandated by the statute but for which applicable forms have not been updated. For example, although a BDC can now qualify as a WKSI, there are not yet provisions by which a registration statement on Form N-2 (other than certain exhibits only post-effective amendments) can be effective automatically nor is there a mechanism to defer payment of filing fees until a takedown occurs. In addition, BDCs taking advantage of the self-implementing incorporation by reference rules will need to evaluate the extent to which undertakings in Form N-2 should be modified in registration statements filed in advance of effectiveness of the final rules or whether the prohibitions on incorporation by reference in existing undertakings can simply be "read out" of existing filings.

In addition, BDCs and offering participants will need to give careful consideration to how to address areas where there are discrepancies between the self-implementing provisions of the SBCAA and the offering and disclosure framework contemplated by the Proposed Rules. For example, as of today, the SBCAA permits broker-dealers participating in a registered offering of a BDC's securities to publish or distribute certain issuer-specific research reports in reliance on the non-exclusive safe harbor provided by Rule 139 under the Securities Act. Since the passage of the SBCAA, however, the SEC has adopted Rule 139b, which provides a safe harbor for the publication and distribution of research reports by broker-dealers participating in an offering by a Seasoned Fund; provided that, among other items, the broker-dealer is not an investment adviser to, or an affiliate of the investment adviser to, the Seasoned Fund (a prohibition that does not appear in Rule 139). As a result of the adoption of Rule 139b, the SEC has not proposed any amendment to Rule 139. Thus, prior to the effectiveness of final rules, broker-dealers who are affiliated with the investment adviser to a BDC could issue research in reliance on Rule 139 but may not be permitted to do so on the face of the final rules. This situation, among others, may create unique challenges that will need to be addressed with legal and compliance teams and potentially external advisers.

Unique Considerations for CEFs

As a general matter, Listed CEFs may view the availability of the Securities Offering Reform regime to be less useful than their listed BDC counterparts. Whereas a BDC may obtain approval to sell or otherwise issue its common shares at a price below its then current net asset value per share, subject to certain limitations and conditions, CEFs generally only have the ability to issue new shares in a secondary offering when their shares are trading at a premium, other than a rights offering to all current stockholders. [17] In addition, the limited trading volume in the CEF secondary market, especially for CEFs with smaller market capitalizations and larger retail investor bases, the lack of analyst coverage for CEFs generally and the non-existent or narrow trading premiums for Listed CEFs may further limit the ability to take advantage of Securities Offering Reform rules in the short-term.[18] On the upside, the potential for enhanced analyst coverage and communications around offerings, and the reduced costs associated with prospectus delivery, may help re-energize that market and cause CEFs to reconsider secondary offerings, including "at-the-market" or "ATM" programs that currently may be viewed as too expensive.

In addition, CEFs, especially those that are not engaged in a continuous offering of their securities, should assess the Proposed Rules that would impose current reporting requirements on Form 8-K to unlisted CEFs with a class of securities registered under Section 13(a) or 15(d) of the Exchange Act. Because shares of these CEFs are not traded on a securities exchange, are not redeemable at the option of shareholders and are generally non-transferrable, the purpose of current reporting on Form 8-K may be of limited value to shareholders but would certainly result in increased costs incurred by those CEFs that would be passed through to such shareholders.[19] For CEFs that are not continuously offered and that do not provide for redemption of their shares, the utility of these reporting requirements should be considered against the potential costs associated therewith.

Cost Benefit Analysis

The Proposed Rules would impose certain meaningful costs upon Affected Funds, particularly with respect to increased disclosure obligations and associated compliance costs. The SEC estimates the increased costs for each BDC and CEF to monitor and report triggering events under the Proposed Rules would equal approximately $206,000 and $196,000[20] per year, respectively. In addition, the SEC estimates that the proposed structured data rules, including the requirements related to Inline XBRL and data tagging, will cost each BDC and CEF approximately $150,000 and $7,200 per year, respectively. In the case of externally-managed BDCs and CEFs, these expenses would largely be borne directly by the Affected Fund (and, indirectly, by common equityholders), whether through payment to outside advisers or reimbursements under an administration agreement. By way of an example, for the 32 BDCs with market capitalizations of less than $500 million as of December 31, 2018, these costs represent, on average, an incremental expense burden of more than 0.1% of net assets. For many listed BDCs, this may represent an increase in annual general and administrative expenses of more than 5.0%.

In the case of Affected Funds that routinely access the public capital markets, a portion of these increased costs imposed will be mitigated by cost savings under the Proposed Offering Rules, including, most significantly, a reduction in audit, legal and printing fees associated with the ability to incorporate by reference, and there are other intangible benefits associated with a streamlined offering process. However, for Affected Funds that do not or cannot access the public capital markets, such as BDCs and CEFs that complete their offerings in reliance on private placement exemptions (and, in particular, CEFs that were not expressly included under the Growth Act), there is likely no means through which to offset the increased out-of-pocket expenses implemented under the provisions of the Proposed Rules that extend beyond granting parity with Securities Offering Reform. As a result, despite industry optimism regarding potential cost savings (and therefore net economic benefits to the industry) at the time the SBCAA and the Growth Act were signed, the net economic effect of the Proposed Rules to the BDC and CEF industry as a whole may be meaningfully less and potentially represent a net economic loss due to the extension of the Proposed Rules beyond granting parity with Securities Offering Reform.

Conclusion

The ability for Affected Funds to fully utilize Securities Offering Reform rules and the full impact of certain of these Proposed Rules may not be known for some time after final rules become effective. As of June 30, 2018, there were less than 100 Affected Funds that had a sufficient public float to satisfy that part of the WKSI test, but over 500 Affected Funds that had a sufficient public float to qualify to file short-form registration statements.[21] However, based on data cited by the SEC, listed Affected Funds represented less than 1% of the daily dollar trading volume on the New York Stock Exchange and Nasdaq in 2017, and Affected Funds overall only represented about 2% of total capital raised in registered offerings that year.[22] Access to Securities Offering Reform rules may promote consolidation among existing Affected Funds to facilitate WKSI qualification, which may result in cost reductions to the benefit of investors. On the flip side, smaller Affected Funds may find it harder to compete given the incremental costs discussed above, and sponsors of new products may find it more difficult to enter the public capital markets. An important dynamic that will need time to play out is whether the extension of Securities Offering Reform to the BDC and CEF industry will result in an increase in interest from investment banks and other distribution channels, in terms of underwritings of initial public offerings and secondary offerings by Affected Funds as well as ongoing research coverage through their analysts.

In conclusion, the Proposed Rules represent a material effort to level the registered offering playing field between Affected Funds and operating companies, as well as between BDCs and CEFs themselves. As with any effort at parity, not every Proposed Rule has the same costs and benefits to all categories of Affected Funds. Given the broad reach of the Proposed Rules, BDCs, CEFs and their investment advisers should assess the Proposed Rules during the comment period as the SEC will need to take action on a final set of rules in light of the legislative mandates of the SBCAA and the Growth Act. Nevertheless, the Proposed Rules appear to have the potential for a number of favorable implications across the industry, including, most importantly, the potential ability to raise capital on a more streamlined and efficient basis.

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[1] Securities Offering Reform for Closed-End Investment Companies, Securities Act Release No. 33-10619 (March 20, 2019) (the "Proposing Release").

[2] Securities Offering Reform, Securities Act Release No. 33-8591 (July 19, 2005), 70 Fed. Reg. 44721 (August 3, 2005) (the "Securities Offering Reform").

[3] Unlike the Proposed Offering Rules, these rule and form amendments are not expressly required by either the Small Business Credit Availability Act (the "SBCAA"), which was signed into law by President Trump on March 23, 2018, or the Economic Growth, Regulatory Relief, and Consumer Protection Act (the "Growth Act"), which was signed into law by President Trump on May 24, 2018.

[4] If the required rulemaking is not completed by May 24, 2020, Listed CEFs and Interval Funds will be deemed to be eligible issuers for the Securities Offering Reform rules as provided by Section 509(a) of the Growth Act.

[5] The SEC acknowledges throughout the Proposing Release that certain benefits of the Proposed Rules are less likely to apply, by their existing terms, to unlisted BDCs and CEFs, similar to the lack of utility of the Securities Offering Reform to unlisted operating companies. For example, Affected Funds without listed common equity would not have a "public float" (e.g., Interval Funds) and therefore would generally not qualify to be WKSIs or to file short-form registration statements. *See*, e.g., Proposing Release at 14. These CEFs, however, would be able to rely on the relaxed communication rules as well as satisfy prospectus delivery obligations by filing a prospectus with the SEC in compliance with applicable law.

[6] Although the timing may have been surprising, multiple members of the Staff had publicly suggested that a single rulemaking that addressed both BDC and CEF offering reform was in process.

[7] Transition guidance, if and when issued by the Staff, would likely address certain of these issues from an SEC operational perspective, such as procedures by which shelf registration statements filed by BDCs that are WKSIs will become effective automatically.

[8] Excluded from this requirement are Form 8-Ks filed solely with respect to Items 1.01 (entry into a material definitive agreement), 1.02 (termination of a material definitive agreement), 1.04 (certain disclosures regarding mine safety), 2.03 (creation of direct financial obligations or an obligation under an off-balance sheet arrangement), 2.04 (acceleration or increases of the same), 2.05 (costs associated with exit and disposal activities), 2.06 (material impairments), 4.02(a) (non-reliance on previously issued financial statements), 5.02(e) (new compensatory arrangements for executive officers), 10.01 (a proposed new item relating to changes in investment objectives or policies) or 10.02 (a proposed new item relating to material write-downs of the fair value of a significant investment).

[9] By contrast to CEFs that offer their securities through private placements are required to register under the 1940 Act on Form N-2, which does not provide for automatic effectiveness, BDCs that do not have exchange-listed securities and elect to privately place their securities pursuant to Section 4(a)(2) of the Securities Act, or Regulation D thereunder, do not register their securities under the Securities Act using Form N-2. Rather, those BDCs, which are commonly referred to as "private BDCs", register their equity securities under the Exchange Act using Form 10 to comply with the election requirements of Section 54 of the 1940 Act. Unlike a filing on Form N-2, a BDC's filing on Form 10 is automatically effective 60 days after filing.

[10] The SEC queried whether, through amendments to Rule 486(b), the SEC should permit a broader group of CEFs, as well as BDCs, to rely on the rule. Notably, the SEC staff has not issued any no-action assurance to a BDC in connection with the use of Rule 486(b). *See* Proposing Release at pp. 136-137 and n. 326.

[11] The definition of "ineligible issuer" generally includes, among others, entities that (1) have failed to file all reports required pursuant to Section 13 or 15(d) of the Exchange Act during the preceding 12 months (or such shorter time that the Affected Fund was required to file such reports), with limited exceptions, (2) are the subject of a judicial or administrative decree or order arising out of a governmental action involving violations of the anti-fraud provisions of the federal securities laws or (3), in the case of CEFs, have failed to file all reports and materials required to be filed under Section 30 of the 1940 Act during the preceding 12 months (or such shorter time that the CEF was required to file such reports or materials).

[12] Affected Funds would still use Rule 497 to file an advertisement that is deemed to be a prospectus under Rule 482 under the Securities Act.

[13] Rule 430B further provides that the effective date of a shelf registration statement for purposes of liability of the issuer and any underwriter under Section 11 of the Securities Act is the date a prospectus supplement is filed in connection with the takedown or takedowns deemed part of the registration statement. By contrast, under Rule 430C, the rule on which BDCs and CEFs engaged in shelf takedowns have relied since 2005, the filing of prospectus supplements does not trigger new effective dates of the registration statement.

[14] For example, the SEC cited to the timing differences with respect to disclosures concerning changes in independent accountants (Item 4.01 of Form 8-K) and results of matters submitted to a vote of securityholders (Item 5.07 of Form 8-K). BDCs and operating companies reporting on Form 8-K must report these items within four business days of the relevant events, whereas a CEF would report a similar event in its shareholder report on an annual or semi-annual basis. *See* Proposing Release at p. 101.

[15] This disclosure requirement would be limited to "significant" investments, which are defined as investments that are greater than 10% of an Affected Fund's total assets, and the required disclosures would include the date on which a material write-down was required and an estimate of the amount or range of amounts of the write-down (which can be disclosed in an amendment if a good faith estimate cannot be made at the time the filing is required). Disclosure would not be required regarding the reasons the write-down was determined to be necessary. In addition, a Form 8-K would not be required if the conclusion that the fair value of the investment should be written down was made in connection with the preparation of financial statements required to be included in the Affected Fund's next periodic report required to be filed under the Exchange Act (or the 1940 Act for CEFs) and such periodic report is timely filed and includes such disclosure.

[16] The information that may be incorporated by reference is listed in Item 13 of Schedule 14A and includes (1) financial statements meeting the requirements of Regulation S-X, (2) Item 302 of Regulation S-K (supplementary financial information), (3) Item 303 of Regulation S-K (management's discussion and analysis of financial condition and results of operations), (4) Item 304 of Regulation S-K (changes in and disagreements with accountants on accounting and financial disclosures), (5) Item 305 of Regulation S-K (quantitative and qualitative disclosures about market risk) and (6) certain information with respect to the attendance of the registrant’s principal accountants at the stockholder meeting.

[17] Section 63(2) of the 1940 Act extends the limitations applicable to CEFs under Section 23(b) to BDCs but provides a framework excepting the periodic issuance by a BDC of its common stock at less than net asset value, including in connection with the BDC's initial public offering, subject to annual shareholder approval (other than in the initial public offering) and certain required findings by a "required majority" (as defined in Section 57(o) of the 1940 Act) of the BDC's board of directors. Although Section 23(b) provides that CEFs could seek shareholder approval to issue common shares at below net asset value in connection with a particular issuance, this practice is not common.

[18] In the Proposing Release, the SEC cited to third party data that indicated listed BDCs had, on average, six analysts following them as of December 2017. As of the same period, the average number of analysts following listed CEFs was zero. *See* Proposing Release at 42, n. 92.

[19] However, CEFs that elect to privately place their securities pursuant to an exemption from the registration requirements of Section 5 of the Securities Act would not be subject to the Form 8-K reporting requirement. *See* Proposing Release at p. 98, n. 243.

[20] We assume that the $19,553,600 per CEF set forth in the Proposing Release is a typographical error.

[21] *See* Proposing Release at p. 152-154.

[22] *See* Proposing Release at p. 42.

APPENDIX A

Rule	Summary Description of Rule	Entities Affected b Proposed Changes[23]
REGISTRATION PROVISIONS		
Securities Act Rule 415	Permits registration of securities to be offered on a delayed or a continuous basis.	Seasoned Funds
Proposed General Instructions A.2 and F.3 of Form N-2	Provide for backward and forward incorporation by reference.	Seasoned Funds
Proposed General Instruction F.4.a	Requires online posting of information incorporated by reference.	Affected Funds
Securities Act Rule 430B	Permits certain issuers to omit certain information from their base prospectuses and update the registration statement after effectiveness.	Seasoned Funds
Securities Act Rules 424 and 497	Provide the processes for filing prospectus supplements.	Affected Funds
Securities Act Rule 462	Provides for effectiveness of registration statements immediately upon filing with the SEC.	WKSIs
Securities Act Rule 418	Exempts some registrants from an obligation to furnish certain engineering, management, or similar reports.	Seasoned Funds
1940 Act Rule 23c-3	Subjects Interval Funds to the registration fee payment system based on annual net sales.	Interval Funds
COMMUNICATIONS PROVISIONS		
Securities Act Rule 134	Permits issuers to publish factual information about the issuer or the offering, including "tombstone ads."	Affected Funds
Securities Act Rule 163A	Permits issuers to communicate without risk of violating the gun-jumping provisions until 30 days prior to filing a registration statement.	Affected Funds
Securities Act Rules 168 and 169	Permit the publication and dissemination of regularly released factual and forward-looking information.	Affected Funds
Securities Act Rules 164 and 433	Permit use of a free writing prospectus.	Affected Funds
Securities Act Rule 163	Permits oral and written communications by WKSIs at any time.	WKSIs

Rule	Summary Description of Rule	Entities Affected b Proposed Changes[23]
Securities Act Rule 138	Permits a broker or dealer to publish or distribute certain research about securities other than those they are distributing.	Seasoned Funds
PROXY STATEMENT PROVISION		
Item 13 of Schedule 14A	Permits certain registrants to use incorporation by reference to provide information that otherwise must be furnished with certain types of proxy statements.	Seasoned Funds
PROSPECTUS DELIVERY PROVISIONS		
Securities Act Rules 172 and 173	Permit issuers, brokers, and dealers to satisfy final prospectus delivery obligations if certain conditions are satisfied.	Affected Funds
STRUCTURED DATA REPORTING PROVISIONS		
Structured Financial Statement Data	A requirement that BDCs tag their financial statements using Inline XBRL.	BDCs
Prospectus Structured Data Requirements	A requirement that registrants tag certain information required by Form N-2 using Inline XBRL.	Affected Funds
Form 24F-2 Structured Format	A requirement that filings on Form 24F-2 be submitted in a structured format.	Form 24F-2 Filers
PERIODIC REPORTING PROVISIONS		
1940 Act Rule 8b-16	A requirement that funds that rely on the rule disclose certain enumerated changes in the annual report in enough detail to allow investors to understand each change and how it may affect the fund.	CEFs
Proposed Item 24.4.h(2) of Form N-2	A requirement for information about the investor's costs and expenses in the registrant's annual report.	Seasoned Funds
Proposed Item 24.4.h(3) of Form N-2	A requirement for information about the share price of the registrant's stock and any premium or discount in the registrant's annual report.	Seasoned Funds

Rule	Summary Description of Rule	Entities Affected b Proposed Changes[23]
Proposed Item 24.4.h(1) of Form N-2	A requirement for information about each of a fund's classes of senior securities in the registrant's annual report.	Seasoned Funds
Proposed Item 24.4.g of Form N-2	A requirement for narrative disclosure about the fund's performance in the fund's annual report.	CEFs
Item 4 of Form N-2	Requires disclosure of certain financial information.	BDCs
Proposed Item 24.4.h(4) of Form N-2	A requirement to disclose outstanding material Staff comments that remain unresolved for a substantial period of time.	Seasoned Funds
CURRENT REPORT PROVISIONS		
Exchange Act Rules 13a-11 and 15d-11	Require CEFs to file current reports on Form 8-K.	CEFs
Proposed Section 10 of Form 8-K	Requires current reporting of two new events specific to Affected Funds.	Affected Funds
Regulation FD Rule 103	Provides that a failure to make a public disclosure required solely by Rule 100 of Regulation FD will not disqualify a "seasoned" issuer from use of certain forms.	Seasoned Funds

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[23] Certain of the Proposed Rules that are denoted as impacting Seasoned Funds would only impact those Seasoned Funds that elect to file short-form registration statements.